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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 523

AB ELECTROLUX,

*Petitioner,*

*vs.*

NATIONAL GAS APPLIANCE CORPORATION,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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TWENTIETH CENTURY PRESS, INC., CHICAGO 6

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner AB Electrolux prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in this case on September 24, 1959.

## OPINION BELOW

The opinion of the court of appeals is not yet reported and is printed in the Appendix hereto, *infra*, pp. 16-23.

## JURISDICTION

The judgment of the court of appeals was entered on September 24, 1959. The jurisdiction of this Court is invoked under 28 USC 1254 (1).

## QUESTION PRESENTED

Whether a federal court of appeals in a diversity case can refuse to follow the forum state Supreme Court's recent construction of a state statute concerning jurisdiction over nonresidents.

## STATUTE INVOLVED

Section 17 of the Illinois Civil Practice Act provides in pertinent part (2 Ill. Rev. Stats. (1957) ch. 110, § 17):

> "(1) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits said person, and, if an individual, his personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of said acts:
>
> "(a) The transaction of any business within this state;
>
> . . . . . .
>
> "(3) Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based upon this section."

## STATEMENT

This action was brought by National Gas Appliance Corporation, a Delaware corporation, to recover damages for a purported breach of an alleged contract for the sale of cooling units for refrigerators by AB Electrolux, a Swedish corporation not licensed to do business in Illinois (R. 2-5).[1] The action was brought in the Circuit Court of

1. Two other counts involving an alleged tortious conspiracy between Electrolux and The Manitowoc Company, Inc., a Wisconsin corporation, are not involved in this petition, because Count II concerned only Manitowoc and Count III was held not to state a cause of action.

Cook County, Illinois, and was removed to the United States District Court for the Northern District of Illinois by another party[2] on the grounds of diversity of citizenship (see R. 1). Process was served on AB Electrolux by delivering a copy of the summons to a lawyer in New York who had been retained by Electrolux (R. 50).

Petitioner filed a motion to dismiss the action or to quash the service of summons on the grounds that the court had no jurisdiction over it and that the service on a lawyer was improper (R. 48-49). The motion was denied by the district court, which, however, approved an interlocutory appeal under Section 1292(b) of the Judicial Code (28 USC § 1292(b)) (R. 60-61). While the appeal was pending, the Supreme Court of Illinois rendered its decision in *Grobark v. Adda Machine Co.*, 16 Ill. 2d 426, 158 N.E. 2d 73 (1959), which held Section 17(1)(a) of the Illinois Civil Practice Act (*supra*, p. 2) did not confer jurisdiction in an identical situation. This case was brought to the attention of the court of appeals by petitioner in its brief and oral argument. Nevertheless, without even discussing the controlling *Grobark* case, the court of appeals affirmed the district court's judgment that it had jurisdiction over Electrolux.

The alleged contract on which respondent relies was contained in a letter sent by petitioner from Sweden on January 21, 1958, to respondent in Illinois, which respondent claims to have accepted by a cable from Illinois to Stockholm on January 29 (R. 9-12). Petitioner denies that a contract was formed, since both the alleged offer contained in such letter and also the purported acceptance refer to the drawing up of an agreement which was never done (R. 11, 12). Petitioner asserts, furthermore, that

2. The Manitowoc Company filed the removal petition. See note 1, *supra*.

under the law of Illinois the district court had no jurisdiction over it regardless of whether or not a contract was formed by this correspondence.

The letter on which respondent bases its claim states that it was "based on our verbal conversations in Stockholm" (R. 9), where respondent's representatives visited for twelve days in 1957 (R. 25-26, 31-32). Respondent claimed in the court below that contract negotiations also took place during a visit by one of petitioner's engineers to Illinois, although the complaint does not so allege and petitioner denies this (R. 26). Petitioner asserts that under the law of Illinois the district court had no jurisdiction over it regardless of where the negotiations took place.

Under the alleged contract, petitioner was to sell respondent cooling units to be placed in refrigerators and sold by respondent (R. 2, 9). Delivery of these units was to be made in Europe, either at an Electrolux factory or f.o.b. Swedish or English port (R. 9-10). Respondent meanwhile began negotiations with The Manitowoc Company for the manufacture of the refrigerators in Wisconsin (R. 5). Damaging information as to respondent's financial background forced petitioner to break off negotiations in February 1958, which it did by cable from Sweden (R. 15).

Petitioner is a Swedish corporation with headquarters in Stockholm. It is not licensed to do business in Illinois. It does not have any office, plant or warehouse in Illinois, nor does it have any resident officers, agents or employees in that state. (R. 50-52.) Respondent is a Delaware corporation not licensed to do business in Illinois, although it did have an office there (R. 2, 59).

## REASONS FOR GRANTING THE WRIT

The court below failed to follow the recent decision of the

Illinois Supreme Court in *Grobark* v. *Addo Machine Co.*, 16 Ill. 2d 426, 158 N. E. 2d 73 (1959), construing the state jurisdictional statute, in holding that the district court had jurisdiction over petitioner AB Electrolux on the basis of an "offer" mailed from Sweden and allegedly accepted by cable from Illinois. There are two reasons why the writ of certiorari should be granted to correct this error. First, the court of appeals decided an important question of state law in conflict with the law of Illinois as declared by its highest court. See Supreme Court Rule 19(1)(b). Secondly, in its refusal to follow the *Grobark* case, the decision below conflicts with decisions of other courts of appeals, such as *Mississippi Wood Preserving Co.* v. *Rothschild*, 201 F. 2d 233 (C.A.5, 1953) and *Pulson* v. *American Rolling Mill Co.*, 170 F. 2d 193 (C.A.1, 1948), which have followed state court decisions in declining to exercise jurisdiction over foreign corporations in diversity cases. Because the court of appeals did not follow the applicable and current ruling of the Supreme Court of Illinois, this Court should exercise its supervisory power and reverse summarily.

1. Although the question has never been decided by this Court, a majority of courts have held that state law should govern a federal court in a diversity case in deciding whether it can exercise jurisdiction over a foreign corporation not licensed to do business in the state. *Pulson* v. *American Rolling Mill Co.*, 170 F. 2d 193 (C.A.1, 1948); *Bomze* v. *Nardis Sportswear*, 165 F. 2d 33 (C.A.2, 1948); *Partin* v. *Michaels Art Bronze Co.*, 202 F. 2d 541 (C.A.3, 1953); *Mississippi Wood Preserving Co.* v. *Rothschild*, 201 F. 2d 233 (C.A.5, 1953). There are contrary holdings (see pp. 13-14, *infra*), and the present case affords an opportunity for this Court to determine the issue finally.

In upholding jurisdiction, the court below did not follow the Illinois Supreme Court's construction of Section 17 of the Illinois Civil Practice Act (*supra*, p. 2), which provides that a nonresident who "in person or through an agent" does certain enumerated acts within the state, thereby submits to the jurisdiction of the courts of Illinois as to a cause of action arising from said acts. The act relied on by respondent was "the transaction of any business within this State" within the meaning of Section 17(1)(a) of the Illinois Civil Practice Act (*ibid.*). The alleged contract on which suit was based in the present case was not executed in Illinois by any agent of petitioner, but rather was contained in a letter sent from Sweden to Illinois. Moreover, the Illinois statute, unlike those of some other states, does not make a single contract made within the state a sufficient basis for jurisdiction. Cf. Maryland Code (1951) Art. 23, Sec. 88(d);[3] Vermont Stats. (1947) Sec. 1562. The court below stated that two visits made by representatives of petitioner to Illinois "constitute at least such minimal contacts with that state that the maintenance of this suit there does not offend traditional notions of fair play and substantial justice" (Appendix, *infra*, p. 20). But "fair play" and "substantial justice" are not the tests stated in the Illinois statute. This statement by the court shows that it *considered* only the due process problem raised by the federal constitution, which should not even be considered unless jurisdiction can be asserted under the law of the state. (See cases cited *supra*, p. 5.) The only two cases upholding jurisdiction cited by the court below, *International Shoe Co.* v. *Washington*, 326 U. S. 310, and

3. Even under the broader Maryland statute, the mailing in Maryland of an acceptance of an offer from outside the state is insufficient to sustain jurisdiction. See *Compania De Astral, S. A.* v. *Boston Metals Co.*, 205 Md. 237, 255; 107 A. 2d 357, 364 (1954), certiorari denied, 348 U. S. 943.

*McGee* v. *International Life Ins. Co.*, 355 U. S. 220, also concern only the constitutional question and are not determinative or even relevant in deciding the issue of state law.[4] The court's conclusory statement that the district court had jurisdiction "under Illinois law" is totally without foundation, for no state decisions upholding jurisdiction are cited in support and the decision of the Illinois Supreme Court in *Grobark* v. *Addo Machine Co.*, 16 Ill. 2d 426, 158 N. E. 2d 73 (1959), is contrary.

In view of the fresh interpretation of the jurisdictional statute by the Supreme Court of Illinois in the *Grobark* case, the court below was not at liberty to "overrule" that decision and make its own interpretative construction. In following the mandate of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, to abide by "state law," federal courts are not free to make an independent interpretation of a state statute contrary to that adopted by the courts of the state. *Fidelity Trust Co.* v. *Field*, 311 U. S. 169, involved the validity of trusts created by bank deposits under New Jersey law. Such trusts were legalized by a state statute, but two decisions by New Jersey appellate courts had nevertheless held them unenforceable. The court of appeals purported to follow state law but, as here, ignored the court decisions and applied the statute as written. This Court reversed, holding:

4. Moreover these two cases are both easily distinguishable from the present one. In *International Shoe* the defendant maintained 11-13 resident salesmen in the state and its activities were regular and systematic, resulting in a large volume of sales in the state. 326 U. S. at pp. 313, 320. Petitioner on the other hand has no agents in Illinois and has made no sales there. The *McGee* case was a suit on an insurance policy by a resident of the forum. Insurance is a field in which the state has a special interest in protecting its residents. See *Hanson* v. *Denckla*, 357 U. S. 235, 252; cf. Illinois Civil Practice Act § 17(1)(d) (2 Ill. Rev. Stats. (1957), ch. 110 § 17(1)(d)).

> "Here, the question was as to the construction and effect of a state statute. The federal court was not at liberty to undertake the determination of that question on its own reasoning independent of the construction and effect which the State itself accorded to its statute.
>
> * * * * *
>
> "* * * the rule of the *Thatcher* and *Travers* cases appears to be the one which would be applied in litigation in the state court, and whether believed to be sound or unsound, it should have been followed by the Circuit Court of Appeals." 311 U. S. at pp. 178, 180.

Similarly in *Pulson* v. *American Rolling Mill Co.*, 170 F. 2d 193, 194 (C.A.1, 1948), the court noted that the language of the state statute governing service on foreign corporations was "very broad" but had been limited by judicial interpretation of the Supreme Judicial Court of Massachusetts, which the federal court was bound to follow. See also *Bomze* v. *Nardis Sportswear*, 165 F. 2d 33 (C.A.2, 1948); *Partin* v. *Michaels Art Bronze Co.*, 202 F. 2d 541 (C.A. 3, 1953); *Mississippi Wood Preserving Co.* v. *Rothschild*, 201 F. 2d 233 (C.A.5, 1953).

Therefore the court below erred in not following the interpretation of Section 17(1)(a) of the Illinois Civil Practice Act made by the Illinois Supreme Court in *Grobark* v. *Addo Machine Co.*, 16 Ill. 2d 426, 158 N. E. 2d 73 (1959). That case, like the present one, was a suit for breach of contract against a foreign corporation not licensed to do business in Illinois and which had no office or resident agents in the state. The contract on which plaintiff relied was also contained in a letter mailed to plaintiff by defendant from outside the state. 16 Ill. 2d at p. 428. Also as in the present case, a representative of the defendant had visited Illinois while the contract was being negotiated. In fact, in the *Grobark* case, the terms of the contract were

entirely negotiated in Illinois by the defendant's president. *Idem*, at pp. 427-428. By the contract plaintiffs became the exclusive distributors of Addo's machines in Illinois, and the breach alleged was that defendant had appointed other distributors in Illinois and had permitted them to use the Grobarks' list of customers and dealers. *Idem*, at p. 428. The Appellate Court of Illinois affirmed an order of the trial court quashing the service of summons, holding that: "the defendant corporation did not submit to the jurisdiction of the courts of Illinois within the meaning of section 17 of the Civil Practice Act" (18 Ill. App. 2d 10, 15; 151 N. E. 2d 425, 427-428 (1958)).

The Supreme Court of Illinois affirmed, agreeing that the defendant foreign corporation was "not transacting business in Illinois" and therefore "did not submit to the jurisdiction of the Illinois courts" (16 Ill. 2d at p. 438). The Court stated:

> "In the present case, the record shows that the defendant Addo Machine Company, Inc., is a corporation organized conformably to the laws of the state of New York and domiciled in that State. It is not licensed to do business within the State of Illinois. It manufactures adding machines outside of Illinois and ships these machines to purchasers throughout the United States. It does not and has not at any time maintained any offices in Illinois, nor employed any officers, agents or employees or other persons within the State." (pp. 436-437).

All this applies equally to the petitioner Electrolux in the present case. The *Grobark* case was a stronger one for jurisdiction because Addo had actually performed under the contract for two years and sold over $150,000 worth of machines in Illinois through its distributors (p. 428). But the court found that the relationship between the Grobarks and Addo was that of seller and purchaser:

> "We concur in the conclusion of the Appellate Court that plaintiffs were not doing business in Illinois as defendant's agents. They were independent businessmen in Illinois selling their own merchandise which had been manufactured by the defendant. They were not transacting business for the defendant in Illinois; they were transacting business for themselves." (p. 437.)

This is also undisputably true in the present case, where the petitioner, if the alleged contract had been entered into and performed, was merely to sell cooling units outside of Illinois to respondent, which was to install them in refrigerators sold at its own prices and under its own name (R. 9-12).

The *Grobark* case holds that neither the making and negotiating of a contract within a state nor sales to independent purchasers within the state under such a contract constitutes the "transaction of any business" justifying jurisdiction over foreign corporations under Section 17(1)(a) of the Illinois Civil Practice Act. Under this principle, jurisdiction cannot be asserted over petitioner in the present case. The only relevant factual distinctions between the present case and *Grobark* make it obvious that the court which decided *Grobark* would *a fortiori* deny jurisdiction here. In *Grobark* both parties performed under the contract for two years, while Electrolux denied that its letter constituted a contract at all and no shipments were ever made under it. Whereas in *Grobark* the breach of contract took place in Illinois, where Addo appointed rival distributors and permitted them to use plaintiffs' customer list, the alleged breach in the present case took place in Europe where Electrolux was to perform by delivering the cooling units to independent carriers (R. 10).[5] In *Grobark*

5. The fact that the alleged contract was purportedly made in Illinois when plaintiff "accepted" defendant's letter is not signifi-

plaintiffs were Illinois citizens who had built up a market in Illinois for defendant's machines, whereas here respondent is a Delaware corporation with no established business in Illinois and the refrigerators were to be manufactured in Wisconsin (R. 2, 16-22).

The decision below relied primarily on two visits by representatives of defendant to Illinois.[6] However, sporadic visits to a state by a foreign corporation's agents are not sufficient to sustain jurisdiction if the corporation has no resident agent within the state. See *International Shoe Co.* v. *Washington*, 326 U. S. 310, 317, 318; *Rosenberg Co.* v. *Curtis-Brown Co.*, 260 U. S. 516; *Erlanger Mills* v. *Cohoes Fibre Mills*, 239 F. 2d 502 (C.A.4, 1956); *Mississippi Wood Preserving Co.* v. *Rothschild*, 201 F. 2d 233 (C.A.5, 1953); *L. D. Reeder Contractors* v. *Higgins Industries*, 265 F. 2d 768 (C.A.9, 1959). This is clearly the law in Illinois under the *Grobark* case, for there the contract was negotiated entirely during a visit to Illinois by the defendant's president, and this was held not to warrant jurisdiction (see pp. 8-9, *supra*).

The court below did not discuss the *Grobark* case or

cant, since, under Illinois law, the place of performance rather than the place of making is considered the significant factor in choice of law. *George* v. *Haas*, 311 Ill. 382, 143 N. E. 54 (1924); *Oakes* v. *Chicago Fire Brick Co.*, 388 Ill. 474, 58 N. E. 2d 460 (1945); *Peresipka* v. *Elgin, Joliet & Eastern Ry. Co.*, 231 F. 2d 268, 272 (C.A. 7, 1956).

6. This breach of contract cause of action did not arise from these two visits, as required by Section 17 (1) and (3) (*supra*, p. 2). Moreover, the court below ignored the fact that the alleged contract states that it was based on negotiations in Sweden (R. 9), which respondent's representatives visited for twelve days (R. 25-26, 31-32). Since the contract was negotiated in Sweden, the complaint did not allege that any contract negotiations took place in Illinois (R. 2-4, 24-28). Actually the so-called offer was sent from Sweden a week *before* the January 1958 Illinois visit of Electrolux representatives (R. 9-34) so that the "contract" could not have been negotiated in Illinois.

attempt to distinguish it in any way. When the district court upheld jurisdiction in the present case it did not have the benefit of the Illinois Supreme Court's *Grobark* decision, which was announced after appeal was pending to the Seventh Circuit. But even if the district court's decision was correct when rendered, it was the duty of the court of appeals to reverse on the basis of the intervening state court decision so that the result would be in accordance with the then controlling decision of the highest state court. *Vandenbark* v. *Owens-Illinois Co.*, 311 U. S. 538. This is not a case where state law can be found only in appellate court decisions, cf. *Fidelity Trust Co.* v. *Field*, 311 U. S. 169, or from antiquated opinions of the state's highest court, cf. *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198, or from dicta or holdings on an analogous point. State law has been made clear by a recent decision of the highest state court in a case indistinguishable from the present one.

2. The issues raised by the present case are important ones which warrant the attention of this Court. The failure of the court below to apply the latest decision of the Illinois Supreme Court raises an appropriate question for certiorari and calls for the exercise of this Court's supervisory power. One ground for granting the writ is that a court of appeals "has decided an important state or territorial question in a way in conflict with applicable state or territorial law." Supreme Court Rule 19(1)(b). Though this Court has stated that "ordinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts," *Huddleston* v. *Dwyer*, 322 U. S. 232, 237, the Court in the very case which this statement was made reversed the court of appeals for failure to apply a recent state Supreme Court decision. The opinion below, which fails to follow or discuss state decisions, is not a "con-

sidered determination" of state law that should be respected by this Court. Even when a court of appeals has clearly recognized that state law was controlling, this Court has frequently granted certiorari to reverse erroneous interpretations of state law. *Steele* v. *General Mills Co.*, 329 U. S. 433; *Huddleston* v. *Dwyer*, 322 U. S. 232; *Equitable Life Ins. Co.* v. *Halsey, Stuart & Co.*, 312 U. S. 410, *Texarkana* v. *Arkansas Louisiana Gas Co.*, 306 U. S. 188; *Wichita Royalty Co.* v. *City National Bank*, 306 U. S. 103; *Riverbank Laboratories* v. *Hardwood Products Corp.*, 350 U. S. 1003 (*semble*). When, as in the present case, the state law is clear, there is no need to defer to the opinion of the court of appeals as to what the state law is. *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198, 205.

The question of state law involved in the present case is an important one—whether a foreign corporation without agents or property in a state is subject to suit on a single "contract" mailed into the state. See Comment, "The Isolated Contract As a Basis of Jurisdiction Over Non-residents", 22 U. Chicago L. Rev. 674 (1955). Another issue of importance is whether a company which contracts to make interstate sales to independent purchasers within a state is transacting business there so as to be subject to the jurisdiction of the state. Cf. *Erlanger Mills* v. *Cohoes Fibre Mills*, 239 F. 2d 502, 509 (C.A.4, 1956). Moreover, the question whether state or federal law governs the jurisdiction of federal courts over foreign corporations in diversity cases is one which frequently recurs and yet has never been resolved by this Court. The decisions below are in conflict.[7] Though a majority of courts hold that state law

7. *Scholnik* v. *National Airlines, Inc.*, 219 F. 2d 115 (C.A. 6, 1955), certiorari denied, 349 U. S. 956, and *Woodworkers Tool Works* v. *Byrne*, 191 F. 2d 667 (C.A.9, 1951) do not refer to state law and apparently hold that federal law is controlling. *K. Shapiro, Inc.* v. *New York Central R. Co.*, 152 F. Supp. 722 (E.D.Mich.,

must control (unless a constitutional question is raised), the decision of this Court in *Riverbank Laboratories* v. *Hardwood Products Corp.*, 350 U. S. 1003, has raised doubts which can be resolved by granting certiorari and reversing the judgment in the present case. These doubts may have influenced the decision below, which straddles the issue by referring to a state statute without following or even discussing the state cases construing it.

The decision below leaves an undesirable discrepancy between the law actually governing state and federal courts in future cases. Cf. *Woods* v. *Interstate Realty*, 337 U. S. 535, reversing 168 F. 2d 701 (C.A.5, 1948). Unfair discrimination will result if corporations not subject to suit in Illinois state courts are suable in federal courts in Illinois. Note, 67 Yale L. J. 1094, 1101-1103 (1958). Thus unless the decision below is reversed, litigants in Illinois with claims for breach of contract against corporations not transacting business in the state through resident agents will be able

1957); *Nugon* v. *Paul-Lewis Laboratories*, 132 F. Supp. 448 (S.D.N.Y., 1955); and *Satterfield* v. *Lehigh Valley R. Co.*, 128 F. Supp. 669 (S.D.N.Y., 1955) specifically hold that federal law is governing and are thus contrary to the decisions cited *supra*, p. 5. See also the concurring opinion of Chief Judge Biggs in *Partin* v. *Michaels Art Bronze Co.*, 202 F. 2d 541, 545 (C.A.3, 1953) and 1 Moore, Federal Practice (2d ed., 1959) ¶0.317[5]; Schwartz, "Federal Court Application of the 'Doing Business' Test in Diversity Cases", 5 Duke Bar J. 129 (1956); Note, 69 Harv. L. Rev. 508 (1956); cf. Note, 56 Columbia L. Rev. 394, 398-403 (1956).

8. The Court of Appeals for the Seventh Circuit applied Illinois law in that case to dismiss the defendant foreign corporation. 220 F. 2d 465. This Court reversed *per curiam*. The Seventh Circuit could not understand the reason. 236 F. 2d 256. At least one court has held that the *Riverbank* decision means that federal law governs the question of jurisdiction over foreign corporations in diversity cases. *K. Shapiro* v. *New York Central R. Co.*, 152 F. Supp. 722 (E.D.Mich., 1957), discussed in 67 Yale L. J. 1094 (1958). On the other hand a commentator has suggested that this Court may have merely wished to correct the Seventh Circuit's misinterpretation of Illinois law. Kurland, "Mr. Justice Frankfurter, The Supreme Court and the Erie Doctrine in Diversity Cases," 67 Yale L. J. 187, 211-212, note 120 (1957).

to sue in federal but not in state courts. This will result in forum shopping and add to the burden of federal courts unnecessarily, because plaintiffs who would otherwise bring suit in state courts will now sue in the federal courts in Illinois where they can avoid the *Grobark* ruling. Plaintiffs whose claims are less than $10,000 or who wish to join Illinois citizens as codefendants will be unfairly discriminated against, for they will be unable to take advantage of the more liberal jurisdictional requirements of the federal courts which were announced by the decision below. Unless corrected by this Court, this situation will be repeated in other states as other circuits feel free to refuse to follow controlling jurisdictional decisions of state courts in diversity cases.

## CONCLUSION

In the exercise of this Court's supervisory power, a writ of certiorari should be granted to compel the court of appeals to respect the recent construction of the Illinois jurisdictional statute by the Supreme Court of Illinois. In *Riverbank Laboratories* v. *Hardwood Products Corp.*, 350 U. S. 1003, this Court *per curiam* reversed the court below because of its misinterpretation of state law. We suggest that similar relief is appropriate here, but because of the court's blatant refusal to respect the *Grobark* decision of the Supreme Court of Illinois, summary reversal is justified in this case.

Respectfully submitted,

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November 1959.

## APPENDIX

In the

# United States Court of Appeals

## For the Seventh Circuit

No. 12587 SEPTEMBER TERM, 1959, SEPTEMBER SESSION, 1959.

NATIONAL GAS APPLIANCE CORPORATION, a Delaware corporation,
*Plaintiff-Appellee,*
v.
AB ELECTROLUX, a Swedish corporation,
*Defendant-Appellant*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

SEPTEMBER 24, 1959

Before HASTINGS, *Chief Judge*, and SCHNACKENBERG and KNOCH, *Circuit Judges*.

SCHNACKENBERG, *Circuit Judge*. Pursuant to leave granted, AB Electrolux, a Swedish corporation, herein also called defendant, has appealed from an order of the district court denying its motion to dismiss the action brought by National Gas Appliance Corporation, a Delaware corporation, herein referred to as plaintiff, or alternatively to quash the return of service of summons herein.[1]

Plaintiff's complaint named as an additional defendant The Manitowoc Company, Inc., a Wisconsin corporation. It is not a party to the motion to dismiss, or to this appeal.

Count I charges a breach of contract by defendant, count II is directed against The Manitowoc Company only, while

1. This action was commenced in an Illinois state court and was removed to the district court.

count III sounds in tort and asserts a conspiracy against plaintiff on the part of defendant and The Manitowoc Company.

On this appeal the relevant facts appear in the complaint, as amended, in affidavits accompanying defendant's motion to dismiss and in affidavits filed by plaintiff in opposition to that motion.

The terms of the contract involved in count I appear in a letter dated January 21, 1958, mailed by defendant, from Stockholm, Sweden, to plaintiff's president, in Chicago, Illinois, as accepted on January 29, 1958 by plaintiff's telegram to defendant. On oral argument, counsel for defendant stated that we may assume for the purpose of this appeal that the receipt of this letter and this telegram respectively constituted the making of a contract. Thereby, in effect, defendant agreed to sell plaintiff cooling units, functioning on natural or manufactured gas, which units were to be shipped to the United States for installation in refrigerator cabinets manufactured for plaintiff in this country. The assembled product was then to be marketed by plaintiff throughout the United States.

The making of said contract followed mail, telephone and telegraph negotiations between the parties beginning in August 1957. In addition thereto, plaintiff relies particularly on the acts of chief engineer Hugo Ullstrand of defendant and Edmund A. Fenander, of New York City, referred to by Mr. Ullstrand as "our United States representative".

About October 29, 1957 Ullstrand came to plaintiff's place of business in Chicago in connection with the problem of fabricating a cabinet to house the Electrolux unit. He spent there about four days, as well as several evenings. He went to Aurora, Illinois, and saw tests made on sample cabinets and was taken by plaintiff's men to the Peoples' Gas Light and Coke Company plant and offices where they and Ullstrand conferred with officers of that company. During his stay in Chicago he discussed with representatives of plaintiff many details to be incorporated in the

proposed contract with defendant, the making of which depended on plaintiff's being able to fabricate a box to house its unit.

Immediately upon his return to Stockholm, Ullstrand, on November 12, 1957, wrote to plaintiff's president a lengthy letter, discussing the results of the aforesaid tests. He made suggestions for further tests, and expressed himself in favor of "the arrangement shown in the attached drawing C-390056".

On January 28, 1958, Ullstrand again came to Chicago to discuss the engineering features of a cabinet, about the manufacture of which plaintiff had contacted The Manitowoc Company, as well as to discuss the plans for fabrication of the complete unit at its factory. He wanted to help plaintiff with remaining problems in the perfection of the refrigerator. He was accompanied to Chicago by Fenander. Fenander said that he traveled over the United States for defendant investigating new processes and negotiating with suppliers for products and materials that could be used by defendant in its manufacturing business.

Ullstrand spent all of January 29, 1958 in plaintiff's offices in Chicago, talking to its president about the manufacture of the refrigerator and cabinets, and called a consultant, Dr. Robert S. Taylor, formerly chief engineer of Servel, Inc., from plaintiff's office and discussed certain of plaintiff's problems, one being the adjustment of the gas burner.

On January 30, 1958, Ullstrand and plaintiff's president flew to The Manitowoc Company in Wisconsin and inspected the cabinet being fabricated around an Electrolux unit for plaintiff, returning to Chicago that evening.

Ullstrand had brought from Sweden and delivered to plaintiff an Electrolux burner and gas control device, adapted to the units to be sold by his company to plaintiff. After lunch on January 31, 1958 Ullstrand and plaintiff's president went to a laboratory in Chicago for tests on the Electrolux gas burner and control.

On February 10, 1958, defendant cabled to plaintiff: "* * * further damaging information your financial background and dealings forces us withdraw offer forthwith we consequently unable deal with you."

Relying upon this cablegram as a breach of contract, plaintiff sues defendant in count I for damages.

1. Defendant contends that the district court erred in denying its motion to dismiss the action of plaintiff for want of jurisdiction of defendant. It relies on § 17 (1) (a) of the Illinois Civil Practice Act, 1955 (§17 (1) (a), Ch. 110, Ill. R. S. 1957), which reads:

> "(1) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits said person, * * * to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of said acts:
>
> "(a) The transaction of any business within this State;
>
> "(b) The commission of a tortious act within this State; * * *".

Under the assumption of defendant's counsel, *ante*, defendant's letter of January 21, 1958 to plaintiff and the latter's telegram of acceptance on January 29, 1958 constituted a contract. It is that contract upon which plaintiff bases count I, claiming a breach. That contract was the culmination of negotiations, conferences, contacts and meetings between the agents of plaintiff and defendant. A substantial part thereof occurred in the state of Illinois. While defendant argues in this court that its chief engineer Ullstrand did not come to Chicago to negotiate any contract, but to discuss technical engineering problems, the evidence is uncontradicted that both he and defendant's United States representative, Fenander, in Illinois, at plaintiff's plant and elsewhere, were busily engaged in satisfying plaintiff that it would be advantageous for it to use defendant's cooling units. Their efforts were obvi-

ously directed toward the consummation of the contract in question.

These acts of defendant's representatives, which occurred in Illinois, constitute at least such minimal contacts with that state that the maintenance of this suit there does not offend traditional notions of fair play and substantial justice. *International Shoe Co.* v. *Washington*, 326 U. S. 310, 316; *McGee* v. *International Life Ins. Co.*, 355 U. S. 220. *Cf. Hanson* v. *Denckla*, 357 U.S. 235, 251; *Orton* v. *Woods Oil and Gas Co.*, 249 F.2d 198; *Kane-Martin* v. *Brooks*, 267 F.2d 394; *Grobark* v. *Addo Machine Co.*, 16 Ill. 2d 426.

We are not at this time concerned with the merits of this case. We merely hold that the district court, under Illinois law, has jurisdiction of the cause of action asserted against the defendant AB Electrolux in this case.

2. In its brief, plaintiff asserts that count III of its complaint, as amended, "charges in tort that Electrolux and Manitowoc *conspired* to bypass plaintiff and by themselves assemble and sell gas refrigerators in this country, to the complete exclusion of plaintiff from the refrigeration field". (Italics supplied.) However, a careful reading of count III reveals that an attempt to make a charge of conspiracy is abortive. After realleging by reference many part of counts I and II, count III in paragraph 23, alleges:

> "Defendant, Electrolux, *in its refusal and neglect to perform its contract with plaintiff* has willfully, maliciously and unlawfully conspired, combined and confederated by and with Manitowoc to refuse to permit plaintiff to proceed with its marketing and sale throughout the United States of gas refrigerators. * * *" (Italics supplied.)

It is then charged that "the said conspiracy" caused plaintiff to be required to abandon its marketing of said refrigerators, to its loss and damage, etc.

It will be noted that there is no allegation that a com-

bination or conspiracy was entered into between Electrolux and Manitowoc to interfere with plaintiff's marketing of gas refrigerators. The charge is that the alleged *fact* that defendant refused and neglected to perform its contract with plaintiff *in itself* was a conspiracy, combination or confederation by and with Manitowoc to interfere with plaintiff's marketing of refrigerators. Where plaintiff is attempting to establish jurisdiction, as to count III, over defendant, in Illinois, it is incumbent upon it to conform to the requirement that it must first allege a conspiracy followed by an allegation of overt acts committed in pursuance thereof. *Kovar* v. *Bremer*, 294 Ill. App. 225, 231; *Brietson* v. *Woodrough*, 164 F.2d 107, 109. Only by so doing can it effectively plead a conspiracy count upon which the court can determine whether there is jurisdiction in a court in Illinois over the person of defendant. Count III is not so drawn and for that reason we hold that it does not state a cause of action against defendant enforcible in Illinois.

Hence the judgment of the court below is reversed as to count III and the cause is remanded with instructions to dismiss said count III, at plaintiff's costs.

3. By its motion to quash service of summons, defendant takes the position that Edmund A. Fenander, hereinabove referred to, upon whom summons in this case was served in New York City, was not authorized by defendant to accept service of process and that consequently said service cannot be sustained.

Relevant statutory provisions are contained in R.S. Ill. Ch. 110, 1957, as follows:

"§ 133. **Service on private corporations.** A private corporation may be served (1) by leaving a copy of the process with * * * any * * * agent of said corporation * * *.

"§ 16. **Personal service outside State.** (1) Personal service of summons may be made upon any party outside the State. If * * * upon a person who

has submitted to the jurisdiction of the courts of this State, it shall have the force and effect of personal service of summons within this State; * * *.

(2) The service of summons shall be made in like manner as service within this State, * * *.

§ 17. **Act submitting to jurisdiction — Process.**

(1) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits said person * * * to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of said acts:

(a) The transaction of any business within this State; * * *

(2) Service of process upon any person who is subject to the jurisdiction of the courts of this State, as provided in this section, may be made by personally serving the summons upon the defendant outside this State, as provided in this Act, with the same force and effect as though summons had been personally served within this State."

The facts hereinbefore set forth show the relationship of Fenander to defendant.

We hold that he was an agent for service on defendant, within the meaning of §§ 13.3, 16 and 17. The affidavit of a deputy sheriff of the city of New York shows that he personally served a summons upon defendant by delivering a true copy thereof personally to Fenander. This was all that was required. The district court did not err in refusing to quash the service of summons on defendant.

For the reasons hereinbefore set forth, insofar as count III is concerned, the order from which the appeal has been taken is reversed and the cause is remanded to the district court with instructions to dismiss said count

Ill. at plaintiff's costs, and in all other respects said order is affirmed.

In Part Affirmed and In Part Reversed and Remanded with Instructions.

A true Copy:

Teste:

.....

*Clerk of the United States Court of Appeals for the Seventh Circuit.*

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JAMES R. BROWNING, Clerk

IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1959

**No. 523**

AB ELECTROLUX,

*Petitioner,*

vs.

NATIONAL GAS APPLIANCE CORPORATION,

*Respondent.*

## BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1959.

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## No. 523

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AB ELECTROLUX,

*Petitioner,*

*vs.*

NATIONAL GAS APPLIANCE CORPORATION,

*Respondent.*

---

# BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

---

*To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:*

## OPINION BELOW.

The opinion of the Court of Appeals for the Seventh Circuit is now reported at 270 F. 2d 472.

## QUESTION PRESENTED.

Assuming *arguendo* the existence of a question, a fair statement of it would not embrace a rebellion by the Court of Appeals against a recent Illinois Supreme Court decision, as petitioner in effect asserts. It simply would be whether or not the Court of Appeals in its application of the Illinois statute on judicial jurisdiction to the particular facts of this case decided the matter in conflict with a recent decision of the Illinois Supreme Court.

## STATEMENT.

Petitioner's epitomic version of the facts leaves considerable to be said with regard to the background of the case, matters important to judicial jurisdiction.

In the summer of 1957 a group of Chicago, Illinois, business men, who incorporated in Delaware and own respondent company, located at Chicago, foresaw a potential market in the United States for gas refrigerators to be sold at prices competitive with their electric counterparts. (R. 3, 28) The market was promising for the only manufacturer of gas refrigerators was discontinuing its line and gas utilities companies were sorely in need of a gas refrigerator to complete the merchandising of their "gas kitchens." (R. 3)

Petitioner manufactured a unique device for cooling refrigerators which functioned on gas, had no moving parts and consequently was silent and enduring in its operation. (R. 3, 24) Respondent's plan was to import petitioner's cooling units and install them in refrigerator cabinets to be fabricated for respondent in this country. (R. 3, 28) Petitioner, at the time, was coveting an American market. (R. 24)

Respondent from Chicago, by cable and telephone, opened negotiations with petitioner in Stockholm in August, 1957, for the purchase of its cooling device. (R. 28) Petitioner wasted no time manifesting its interest in the plan by letter to respondent in which the latter was referred to petitioner's United States representative, one Edmund A. Fenander, in New York City. (R. 29, 30) From August, 1957, until the disruption of the relations between the parties on February 10, 1958, they worked together in complete harmony and design, for their ultimate mutual

profit, to fabricate a refrigerator cabinet housing petitioner's cooling unit which would meet the exacting requirements of the gas utilities companies in America. (R. 25-27, 28-40) Petitioner extended to respondent all the technological help it could muster. (R. 25)

During the mentioned seven months' period the parties engaged in the following activities:

(a) They communicated with each other, between Stockholm and Chicago, by mail, transatlantic telephone, cable and wireless countless times with reference to contract terms and technical problems. (R. 25, 38-39)

(b) They exchanged between Stockholm and Chicago engineering drawings, specifications, ideas, information and instructions on all aspects of the refrigeration problems involved. (R. 25)

(c) Petitioner sent from Stockholm to Chicago for respondent's use still pictures, motion pictures, recordings for training salesmen, scripts, radio commercials and printed publicity material extolling its products. (R. 25)

(d) Respondent's representatives went to Stockholm in September, 1957, spending 12 days there conferring with petitioner's management on contract terms and technical matters. (R. 25-26)

(e) Petitioner at various times shipped to respondent at Chicago sample cooling units, gas control devices, gas burners and prototypes of refrigerators which were tested and demonstrated by respondent in Chicago and elsewhere in aid of the fabrication of a suitable refrigerator cabinet. (R. 26)

(f) Respondent shipped from Chicago to Stockholm for testing in petitioner's laboratories several American-made refrigerators and insulation material. (R. 26)

(g) Respondent demonstrated the petitioner's cooling unit at a meeting of the American Gas Association in Chicago, Illinois, in September, 1957. (R. 27)

(h) Petitioner's chief engineer Ullstrand came to Chicago from Stockholm in October, 1957, spending about 4 days with respondent's representatives *discussing terms of the proposed contract between the parties,* technical problems involved and participating in tests in Chicago and Aurora, Illinois, of sample cabinets patterned after petitioner's Swedish cabinet. (R. 26, 33)

(i) On January 7, 1958, respondent wrote petitioner requesting that their contract discussions be reduced to writing. (R. 9)

(j) On January 17, 1958, petitioner from Stockholm solicited respondent by telegram to submit a firm order for cooling units covering respondent's April to June requirements. (R. 42)

(k) Respondent, by telegram to Stockholm on January 20, 1958, ordered 3,200 cooling units from petitioner. (R. 27, 42)

(l) By respondent's letter of January 21, 1958, over the signature of its president, Mr. E. V. Ekman, the terms of the agreement between the parties were reduced to writing, and respondent was requested to advise petitioner of its acceptance thereof. (R. 9-12)

(m) On January 28, 1958, petitioner's chief engineer, Ullstrand, and its Edmund A. Fenander came to Chicago for discussions with respondent's representatives. That evening, Mr. Fenander spent 2 to 3 hours with respondent's president, Sheriff, inquiring into respondent's finances. Mr. Fenander requested that a meeting be arranged for him with respondent's banking connections. (R. 34, 35)

(n) Mr. Ullstrand spent about 5 days in Chicago with respondent's representatives working on technical matters. They flew to Manitowoc, Wisconsin, to inspect the cabinet which defendant, Manitowoc,

was fabricating for respondent. Mr. Ullstrand had brought from Sweden a gas burner and control device, which were tested at the Peoples Gas, Light & Coke Company's laboratory at Chicago, Illinois, in the presence of respondent's representatives and Mr. Ullstrand. From respondent's office, Mr. Ullstrand telephoned Dr. Robert S. Taylor (formerly chief engineer of Servel, Inc.) at Evansville, Indiana, to discuss adjustments of the gas burner for proper mixtures of gas and air for the different types of gases used in the United States. He persuaded Dr. Taylor to agree to render consulting services to respondent. (R. 34-37)

(o) On January 29, 1958, while Messrs. Ullstrand and Fenander were in Chicago, respondent telegraphed petitioner at Stockholm that the terms of the agreement set forth in Mr. Ekman's letter of January 21, 1958, were satisfactory. (R. 12)

(p) Respondent paid Harris Trust and Savings Bank at Chicago, on account of the purchase price of cooling units ordered from petitioner a total of $5,595, which money the bank cabled to petitioner's bank in Stockholm between January 31 and February 6, 1958. (R. 27, 37)

(q) Between January 31 and February 10, 1958, the parties were in contact by telephone and telegrams between Chicago and Stockholm with reference to petitioner's claim that it had not received the money above described and its request that respondent post a bank guarantee by February 10, 1958, of $186,900 to secure future payments. (R. 37)

(r) On February 10, 1958, at 6:23 A.M., petitioner wired from Stockholm to respondent at Chicago that because of "further damaging information your (respondent's) financial background and dealing forces us to withdraw offer forthwith we consequently unable deal with you." (R. 15)

(s) Petitioner wrote respondent on March 11, 1958, to advise that it would not consider resumption of

> relations with respondent because it had reached a preliminary agreement with (defendant) Manitowoc for the production of a refrigerator using petitioner's cooling unit and that there no longer was room for respondent in the field. (R. 23-24)

Thereafter respondent sued petitioner and the defendant, Manitowoc, in the Circuit Court of Cook County, Illinois. Manitowoc removed the case to the United States District Court at Chicago. Petitioner was served by summons delivered personally to its agent Fenander in New York. Respondent's claim against petitioner, involved in this application for certiorari, is for the breach of petitioner's contract with respondent to sell the latter its gas cooling units. The contract was made in Illinois by respondent's dispatch from Chicago of its telegram of January 29, 1958, to petitioner accepting the offer made by the latter in its letter of January 21, 1958. (subparagraphs (f) and (o) above) The making of a contract between the parties was conceded for the purposes of the appeal by petitioner's counsel on the oral argument of this case below. This concession is twice mentioned in the opinion below. (270 F. 2d at pages 474-5) Respondent contends the court had judicial jurisdiction over petitioner by reason of the more than "minimal contacts" which it had with the State of Illinois in its dealings with respondent out of which the cause of action arose. With this both the District Court and the Court of Appeals agree.

## REASONS FOR DENYING CERTIORARI

### I.

### The Court of Appeals Decision is Distinctly Correct.

In construing Section 17 of the Illinois Civil Practice Act, both state and federal courts agree that this statute expands judicial jurisdiction to the maximum limits of due process. In both *Nelson* v. *Miller*, 11 Ill. 2d 378, 389

(1957) and *Grobark v. Addo Machine Company, Inc.*, 16 Ill. 2d 426, 431 (1959), the Court said:

> "Sections 16 and 17 of the Civil Practice Act reflect a conscious purpose to assert jurisdiction over nonresident defendants to the extent permitted by the due process clause."

Similar statements are found in *Orton v. Woods Oil and Gas Co.*, 7 Cir., 249 F. 2d 198, 202 (1957); *Bluff Creek Oil Company v. Green*, 5 Cir., 257 F. 2d 83, 86 (1958); *Kane-Martin v. Brooks*, 7 Cir., 267 F. 2d 394, 397 (1959); *Haas v. Faucher Furniture Company*, N.D. Ill., 156 F. Supp. 564, 567 (1957); *Rensing v. Turney Aviation Corp.*, N.D. Ill., 166 F. Supp. 790, 798 (1958); *Sunday v. Donovan*, 16 Ill. App. 2d 116, 126, 147 N.E. 2d 401, 463 (1958); and *Berkowitz v. Superior Distributing Co.*, 17 Ill. App. 2d 522, 524-525, 151 N.E. 2d 116, 117-118 (1958). No court has rejected this significant statement of the policy underlying Section 17.[1]

Additionally, in *Nelson v. Miller, supra*, 11 Ill. 2d 378, at page 384, the Supreme Court of Illinois made it clear that Section 17 was enacted to take advantage of the new and expanded boundaries of state jurisdiction announced in this Court's decision in *International Shoe Co. v. Washington*, 326 U.S. 310.

In the light of the foregoing, the Illinois Court in *Grobark*, considering for the first time Section 17(1)(a) of the Illinois Act, being the "transaction of *any* business" clause, and the Court of Appeals in the present case,

---

[1] This is the interpretation of all commentators who have discussed Illinois Section 17. For examples, Cleary & Sedar, **Extended Jurisdictional Basis for the Illinois Courts**, 50 NW. U.L. Rev. 599, 607 (1955); O'Connor & Goff, **Expanded Concepts of State Jurisdiction over Non-Residents**, 31 Notre Dame Lawyer, 223, 237 (1956); Reese, **Judicial Jurisdiction Over Non-Residents; The Impact of McGee v. International Life Insurance Company**, 13 The Record of The Association of The Bar of The City of New York, 139, 151 (1958).

with the same problem, were primarily engaged in an interpretation of the due process requirements of the Fourteenth Amendment as defined by this Court. This for the reason that the permissible areas of due process and those of Illinois Section 17 are co-extensive. Essentially, in application of the Illinois law to the facts of a particular case, the courts of Illinois need not, as petitioner suggests, first consider whether jurisdiction attaches under the state law and then approach the due process problem. The two questions may be wrapped up in one operation. Petitioner's concern, then (Petition, pages 6-7) with the rationale of the Court of Appeals as primarily one involving the due process problem raised by the Federal Constitution overlooks this similarity between federal and state law. It is not merely that the Federal Constitution delimits the Illinois law but it, through the decisions of this Court, defines it as well.

Significantly, the opinion of the Illinois Supreme Court in *Grobark* revolves about the Federal Constitutional problem. The same complaint which petitioner levels at the Court of Appeals in the present case could be advanced against the opinion in *Grobark*. Chief Justice Daily, speaking for the majority of the Court in *Grobark* (Justices Davis and Schaefer dissenting) after devoting virtually his entire opinion to a discussion of the recent decisions of this Court on judicial jurisdiction, said in conclusion (16 Ill. 2d at page 438, 158 N.E. 2d at page 79):

> "As recently announced by the United States Supreme Court, in the *Hanson* case, there are still territorial limitations to a State's *in personam* jurisdiction. Since Addo did not have 'minimum contacts' with the State of Illinois, we are of the opinion that Addo did not submit to the jurisdiction of the Illinois courts."

That the Court of Appeals in its decision in the instant case considered the Illinois law, including the *Grobark* case, with the decisions of this Court, is evident by the following quotation from the Court's opinion (page 475):

> "These acts of defendant's representatives, which occurred in Illinois, constitute at least such minimal contacts with that state that the maintenance of this suit there does not offend traditional notions of fair play and substantial justice. *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316; *McGee* v. *International Life Ins. Co.*, 355 U.S. 220. Cf. *Hanson* v. *Denckla*, 357 U.S. 235, 251; *Orton* v. *Woods Oil and Gas Co.*, 249 F 2d 198; *Kaye-Martin* v. *Brooks*, 267 F. 2d 394; *Grobark* v. *Addo Machine Co.*, 16 Ill. 2d 426.
>
> "We are not at this time concerned with the merits of this case. We merely hold that the district court, *under Illinois law*, has jurisdiction of the cause of action asserted against the defendant AB Electrolux in this case." (Emphasis supplied)

The Court in its citation signal prefacing *Denckla, Orton, Kaye-Martin* and *Grobark, supra,* indicated the authority of these cases for the proposition cited but made it clear that in its opinion their facts are materially different from those at bar.

Additionally, on the oral argument of the instant case considerable time was utilized by the Judges of the Court with counsel in a discussion of the ramifications of *Grobark.*

But the case at bar turns on its own facts. In applying the limits of due process courts must necessarily determine each case on an *ad hoc* basis.

Petitioner contends that the "decision below relied primarily on two visits to Illinois" by representatives of

the petitioner. This is a masterful statement in de-emphasis of the facts.

Actually, the record discloses that petitioner conducted an economic invasion of Illinois lasting for a period of some seven months. It was not just a "footpad" or sortie in Illinois. Petitioner's motive was to realize a pecuniary benefit or profit and hence was purposeful. True, the petitioner did not reap a harvest, but that was its own fault, not respondent's. From August, 1957 until petitioner repudiated its contract with respondent on February 10, 1958, the parties were virtually wedded in a union dedicated to the development for marketing throughout the United States of a gas refrigerator which would function with petitioner's cooling unit. This was the hypostasis of the relationship. Obviously, petitioner in order to sell its cooling device had to make it work in the refrigerator cabinet being designed and fabricated in America for respondent.

Accordingly, petitioner's officers and agents extended themselves in their cooperation with respondent in the diagnosis and solution of the many perplexing technical problems which cropped up to plague the parties. Petitioner's "know how" derived from years of experience in the refrigeration field was marshaled to help respondent.

The agents of petitioner came to Illinois on two occasions in pursuit of their employer's business with respondent. One of them, Mr. Hugo Ullstrand, petitioner's chief engineer, spent four days on the occasion of his first visit and five days on the next, working with respondent's officers. These visits were not just casual "drop ins". Chief Engineer Ullstrand brought into the forum the respondent's products (the subjects of the ultimate contract) which were subjected to exhaustive tests in which he participated. Conversely, refrigerator

cabinets and allied materials of American manufacture were sent from the forum to petitioner in Stockholm where they, in turn, were tested and in the presence of respondent's agents who spent twelve days in Stockholm conferring with petitioner's management on contract terms and technical matters.

All media of communication between Stockholm and Chicago were utilized by the parties in the exchange of technological information, in contract discussions and finally with respect to performance of their contract.

Significant also is the fact that petitioner sent from Stockholm to Chicago for respondent's use still pictures, motion pictures, recordings for training salesmen, scripts and the like, extolling the virtues of the refrigerators and cooling units which it manufactured and sold in European markets and elsewhere.

The invaluable assistance petitioner extended respondent during the months they worked hand in hand, including the sending of its agents, products and publicity into Illinois, was an indirect, possibly, but cogent solicitation and negotiation of respondent's business.[2]

On this the Court below said (270 F.2d at page 475):

> "While defendant argues in this court that its chief engineer Ullstrand did not come to Chicago to negotiate any contract, but to discuss technical engineering problems, the evidence is uncontradicted that both he and defendant's United States representative,

[2] Petitioner asserts (p. 11) that the complaint does not allege that any actual contract negotiations took place in Illinois. However, the affidavit of respondent's president, in opposition to petitioner's motion, states that discussions of contract terms did occur in Chicago, Illinois, in conversations between affiant and chief engineer Ullstrand during the latter's October, 1957, visit. (R. 33) This was never denied by Mr. Ullstrand.

> Fenander, in Illinois, at plaintiff's plant and elsewhere, were busily engaged in satisfying plaintiff that it would be advantageous for it to use defendant's cooling units. Their efforts were obviously directed toward the consummation of the contract in question."

Petitioner directly solicited respondent in Chicago by telegram of January 17, 1958, to submit a firm order for cooling units covering respondent's April to June requirements. (R. 42)

The offer on the part of petitioner to sell its products to respondent was contained in its letter of January 21, 1958, over the signature of its president, E. V. Eckman, mailed from Stockholm to respondent at Chicago, Illinois. (R. 9-12) After reciting at length the terms of the offer, including all the essential elements of their bargain, Mr. Eckman in closing stated:

> "I believe this is more or less all that is required. If you agree I shall have the agreement drawn up in proper legal form."

Pursuant thereto respondent telegraphed its unequivocal acceptance of this offer on January 29, 1958. (R. 12)

The fact that the terms of the offer were to be "drawn up in proper legal form" did not destroy the efficacy of the contract expressed in petitioner's letter and accepted by respondent's wire. *Geary* v. *Great Atlantic and Pacific Tea Company,* 366 Ill. 625, 628-9, 10 N.E. 2d 350, 351 (1937); *Sanders* v. *Pottlitzer Bros. Fruit Co.,* 144 N.Y. 209, 213-4, 39 N.E. 75, 76 (1894); 1 Williston on Contracts (rev. ed.) sec. 28 (A) 64, 67. Particularly is this rule applied where the parties have acted on the contract as in the instant case. *New York Hamilton Corp.* v. *First Illinois Co.,* 257 Ill. App. 125, 130 (1930). In *Johnston* v. *Commission,* 352 Ill. 74, 76, 185 N.E. 191, 192 (1933) the

Supreme Court of Illinois announced the elementary principle of the law of contracts that the place where the last act necessary to give validity to the contract is done is the place where the contract is made. The conclusion is inescapable that the contract between the parties became effective on January 29, 1958, when respondent wired its acceptance from Chicago of petitioner's earlier offer. This was when the last act necessary to give validity to the contract occurred. The minds of the parties had met and agreed upon certain specified and distinct obligations which were to be observed by both. It is plain that Chicago was the place where the contract was made.

Petitioner in this Court denies the existence of a contract between the parties (Petition, p. 3 *et seq.*). This denial must be with *tongue in cheek* since its counsel, in his oral argument before the Court below, conceded the existence of a contract for the purposes of the appeal. This concession is twice alluded to in the opinion below, 270 F. 2d at pages 474 and 475.

It is readily apparent from the letters of petitioner's officers that they considered a contract duly made. President Ekman in the crucial letter of January 21, 1958, described it as a "*draft agreement*", stated "I believe the *agreement* can be condensed as follows", and then in legal phraseology proceeded to recite the terms of the contract by saying (R. 9):

> "*Agreement* between AB Electrolux, Stockholm, hereinafter called Elux, and National Gas Appliance Corporation, Chicago, hereinafter called National.
>
> 1. Elux *agrees* to supply National with cooling units, etc. . ."

In clause No. 11 of this same letter Mr. Ekman stated: "*This agreement* may be terminated with 12 months notice" and then additionally provided for immediate

termination of the "*agreement*" on the occasion of certain specified events. (emphasis supplied) (R. 11)

Mr. N. Laurin, petitioner's vice president, wrote respondent on January 22, 1958, a letter the whole tenor of which was to the effect that an agreement had been reached by the parties, saying, among other things: "According to the terms of payment agreed upon. . . .". (R. 13-14)

Consistent with petitioner's conviction that it had a contract with respondent are its telegraphic requests to respondent in February, 1958, to make the payments required by the agreement. (R. 37)

Petitioner's arguments in denial of a contract seem futile in the light of the above mentioned concessions and facts. Assuming then a contract and one made in Illinois, it is apparent that this alone is sufficient for jurisdiction of Illinois courts. If the making of a contract of this nature is not the transaction of "*any business*"; it is impossible to conceive of what precisely would constitute the transaction of some business.

Petitioner argues that even if the contract was made in Illinois when respondent "accepted" petitioner's letter, it would not be significant since under Illinois law the place of performance rather than the place of making is considered the controlling factor in choice of law. (Note 5, pages 10-11) While the place of performance may govern the construction of a contract, this is not the issue here. The place of making is a significant factor as a judicial jurisdiction "contact".

In *Hanson* v. *Denckla*, 357 U.S. 235, at pages 251-252, this Court, in distinguishing *Hanson* from *McGee* v. *International Life Ins. Co.*, 355 U.S. 220, considered of special importance, among other things, the fact that in

*McGee* the offer by mail of the non-resident defendant was *accepted* in California.

Of course, whether or not the contract in the case at bar was made in Illinois is not decisive of the matter by any means. The least that can be said for the contract is that it had a substantial connection with Illinois.

Additional to petitioner's affiliations with Illinois already considered are the final phases of the relationship of the parties, the requests of petitioner for payments under the contract (R. 37), the remittances by respondent from Chicago, totaling $5,595 to petitioner's Stockholm bank (R. 27, 37)[1], and petitioner's break-off cable to respondent of February 10, 1958, in which it said that because of damaging information it received with regard to respondent's financial background, it was unable to "deal" with respondent. (R. 15) Respondent relies on this cablegram as a breach of contract.

In *Compania de Astral, S.A.* v. *Boston Metals Co.*, 205 Md. 237, 107 A.2d 357 (1954), certiorari denied 348 U.S. 943, a case comparative to the instant case but lacking in many of the connections shown here, the Maryland Court of Appeals sustained the constitutionality of a statute subjecting foreign corporations to suit on causes of action arising out of a contract made in Maryland.[2] The Court held that the contacts with the forum of a Panama corporation having no office in the United States *(or registered agent)* and not "doing business" in Maryland were

---

[1] Analogous to the premium payments in **McGee.**

[2] Md. Ann. Code, art. 23, 88(d) (1951). This statute is not broader than Illinois Section 17 as petitioner asserts in Note 3, page 6 of its petition. The statute requires that a contract be made in Maryland or a liability incurred there. See discussion of this statute in O'Connor & Goff, **Expanded Concepts of State Jurisdiction Over Non-Residents**, 31 Notre Dame Lawyer 223, 238 (1956).

sufficient for jurisdiction under the statute and satisfied the Federal Due Process Clause.

In the *Astral* case, the only connections the defendant had with the forum were (1) its agents went to Baltimore on two occasions to inspect the three frigates which it was purchasing, the subjects of the contract, (2) the defendant's agents had a one-day conference with plaintiff in Baltimore and reached a general agreement as to price (but the final contract terms were worked out in New York), (3) the contract documents after being executed in Panama were brought by defendant's agents to Maryland where they were signed by plaintiff, (4) defendant sent a notification to plaintiff advising of the acceptability of the vessels, and (5) defendant made an escrow deposit in Baltimore pursuant to the contract which provided, among other things, that its construction was to be in accordance with Maryland law.

As to these connections the Maryland Court of Appeals said (205 Md. at page 261-2, 107 A.2d at page 267):

> "All of these things . . . it is true, related to what was but a single transaction; but all told, they add to a considerable contact with this State and considerable reliance upon its laws and the protection which they afforded."

But *Compania de Astral* as well as *Grobark* are lacking in the many additional contacts conspicuous in the case at bar, particularly those contained in petitioner's solicitation of respondent's business extending over a period of some seven months. This relation as manifested both in and out of the forum was not an arm's length transaction as suggested by petitioner below, but a virtual partnership. It was not expressed unilaterally in the forum but bilaterally. It was stimulated by petitioner's desire to penetrate into a potentially substantial and rich American market.

The petitioner enjoyed the benefits and protection of the laws of Illinois. It is certain that if respondent had defaulted in its obligations under the contract petitioner would have utilized the courts of the forum. With the exception of the officers of the petitioner, all witnesses, both willing and unwilling, are in Illinois and Wisconsin. The unwilling ones, of course, could not be required to go to Sweden for a trial there. The expense to respondent of a trial overseas would be prohibitive, to say nothing of the hardship involved. In effect, to relegate respondent to a suit in Sweden is to give petitioner relative immunity from legal responsibility.

Justice Davis made the point, relevant here, in his dissent in *Grobark* (16 Ill. 2d at page 439) that to refuse plaintiffs in that case to sue Addo in Illinois would require them to go to New York where they would be unable in their suit to join the individual resident defendants. So, here, respondent would be unable to join defendant Manitowoc in any litigation in Sweden. It would seem that fair play and substantial justice would be served by a trial of this suit in Illinois.

The cause of action sought to be enforced arises out of petitioner's activities in this state, in connection with its relationship with respondent. It is clear that the contacts of petitioner with the State of Illinois, solicitation and negotiation, plus contract plus performance are sufficient even to constitute a "doing of business" in the forum.[1]

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[1] The late Justice Rutledge expressed himself vigorously on the matter of "solicitation" in **Frene v. Louisville Cement Co.**, D.C. Cir., 134 F.2d 511, 516, when he said: ". . . No business man would regard 'selling', the 'taking of orders,' 'solicitation' as not 'doing business.' The merchant or manufacturer considers these things the heart of business . . . It would seem, therefore, that the 'mere solicitation' rule should be abandoned when the soliciting activity is a regular, continuous and sustained course of business, as it is in this

Petitioner's constant references to the requirement in the forum of a "registered agent" to sustain jurisdiction over a foreign corporation demonstrates, it seems, a forlorn hope that this Court will return to the rigid concepts of *Pennoyer* v. *Neff*, 95 U.S. 714.

## II.

### There is no Conflict of Decision.

The *Grobark* case, *supra*, 16 Ill. 2d 426, 158 N.E. 2d 73 (1959), around which petitioner's application here gravitates is readily distinguishable on its facts from those of the case at bar. Again, it is noted that *Grobark* is the first Illinois Supreme Court case to construe the "transaction of any business" clause of section 17. Also is noted that the District Court had the benefit of the Appellate Court's decision in *Grobark*, 18 Ill. App. 2d 10, 151 N.E. 2d 425 (1958), when it passed on petitioner's motion attacking the jurisdiction of the court.

*Grobark* is not close factually to the case at bar. The defendant there, a New York manufacturer, sold its goods to independent Illinois businessmen for resale. The orders for its goods were placed in New York where they were accepted. The defendant in *Grobark* did not employ any officers or agents in Illinois and had no control over plaintiff or any of its distributors in Illinois or elsewhere.*

Without implying similarity in other respects between *Grobark* and the case at bar, the essential differences between them are:

(1) Defendant in *Grobark* employed no officers or agents in Illinois. Petitioner, on the other hand, had

---

* (Continued)
case. It constitutes, in the practical sense, both 'doing business' and 'transacting business,' and should do so in the legal sense. . ."

its agents in Illinois on two occasions for an aggregate of about nine days. They were actively pursuing in the forum its business with respondents. While in *Grobark* the plaintiffs charged in their complaint that defendant's president had negotiated with them in Chicago, to make them distributors of defendant's products, this is not mentioned in the Appellate Court's opinion, nor is it borne out by the record findings of the Supreme Court which said that defendant employed no officers or agents in Illinois. (16 Ill. 2d at 437)

(2). Defendant in *Grobark* does not appear to have had the countless contacts with the forum had by petitioner through the agencies of mail, telephone, wireless and cable.

(3) *Grobark's* defendant no longer had any possessory interest in the products it sold after their delivery to independent carriers in New York, whereas at bar petitioner loaned its products (and advertising materials) to respondent in Illinois for testing, experimentation and exposition.

(4) *Grobark's* defendant had no control over its vendee distributors in Illinois or elsewhere. Petitioner at bar, however, exercised certain controls over respondent, first, as to where it could sell its products (R. 11), and, second, the important right of approval of the refrigerator cabinets to be manufactured to house its cooling units for respondent in this country. (R. 9)

(5) In *Grobark* the plaintiffs could order defendant's products or not, as they saw fit, and orders were accepted in New York. At bar there was no privilege of acceptance or rejection of orders, petitioner was obligated to furnish the contract requirements and respondent to accept and pay for them. (R. 10)

(6) In the instant case the relationship between the parties, enduring some seven months, was virtually a partnership in the development of a refrigerator which would function on petitioner's unit. In fact petitioner was obligated by contract to give all possible assistance to respondent in the development of refrigerator models. (R. 9) In *Grobark* the relationship was the antithesis of this, plaintiff's activities there being strictly unilateral.

(7) At bar there was a vigorous solicitation of respondent's business by petitioner during the entire period of the relationship, this in the form of extensive technical help and assistance given in the forum and by transmittal to it through the various media of communication. Additionally, petitioner directly solicited respondent's order for cooling units by telegram to respondent at Chicago. Solicitation was absent in *Grobark*.

(8) At bar the parties negotiated their contract by mail as well as by discussions in Stockholm and Chicago.

(9) Here there is a contract between the parties made in Illinois. In *Grobark* there was no such contract and petitioner's constant insistence throughout its petition that there was will not create the fact. The *alleged* contract in *Grobark* was a letter written by defendant to plaintiffs. The Illinois Appellate Court said this letter required nothing of plaintiff in the way of performance and held the letter "which plaintiffs say is a contract" unilateral and void for want of mutuality. 18 Ill. App. 2d at page 15, 151 N.E. 2d at page 427. The Supreme Court did not consider, apparently, that there was much to plaintiffs' contention and declined to pass on the validity of the alleged contract. 16 Ill. 2d at page 438, 158 N.E. 2d

at page 80. This position of the Supreme Court did not amount to approval or disapproval of the Appellate Court's holding that the alleged contract was void and leaves the Appellate Court's pronouncement on this point as the law of the case. 5B C.J.S., Appeal & Error, § 1964, p. 574, and cases cited. A fortiori, there was no contract in *Grobark*.

The claims which petitioner attributes to *Grobark* throughout its brief are completely unfounded, particularly so is its contention that *Grobark* is identically similar to the case at bar and that *Grobark* holds that neither the making and negotiation of a contract within the state constitutes the "transaction of any business" justifying judicial jurisdiction. If *Grobark* has done this to section 17, it has completely emasculated the act and no court could be criticized for failure to follow *Grobark*.

The holding in *Grobark* simply is that the defendant did not have the "minimal contacts" with Illinois required for due process. It is a very general holding and in no way predetermines this case. There is no doubt but that if the present case were before the Supreme Court of Illinois it would decide it as did the Court of Appeals.

## III.

## There Are No Special And Important Reasons For Granting the Writ.

The principal theme in petitioner's application to this Court is predicated on the alleged error of the Court of Appeals in interpreting state law. Petitioner thus concedes the applicability of Illinois law, but on pages 13 to 15 of its petition, it raises the question as to whether state or federal law governs the jurisdiction of federal courts over foreign corporations in diversity cases, concluding that the decisions of the lower federal courts are

in conflict on this question. This conflict, however, is not irreconcilable.[6]

Petitioner did not raise this point below and can not now contend seriously that some federal precedents (not mentioned by it) control the instant case rather than the law of the forum as measured by due process. Certainly there is no federal rule on the subject which would supersede. Without offering something of greater efficacy it is obvious that petitioner, in desperation, is raising an issue which, as to this case, is purely academic.

Rule 19(1) of this Court states emphatically that a review is not a matter of right but of sound judicial discretion and will be granted only where there are special and important reasons therefor. Special and important reasons imply a reach to a problem beyond the academic or the episodic. *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 74.

Certiorari, if granted here, would be for the sole interest of petitioner and would be an imposition, we believe, on this Court's time for consideration of those classes of

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[6] See discussion in Note, 67 Yale L.J. 1094, 1104 et seq. (1958). Petitioner states that this Court's reversal of the Seventh Circuit in **Riverbank Laboratories v. Hardwood Products Corp.**, 350 U.S. 1003, has raised doubts resolvable by granting certiorari in the present case. Professor Kurland in "Mr. Justice Frankfurter, The Supreme Court And The Erie Doctrine In Diversity Cases", 67 Yale L.J. 187, 211-212, Note 120 (1957) points out that the Seventh Circuit decision relied on Illinois decisions rendered prior to **International Shoe** and cases which thereafter broadened the powers of the states in this area. He speculates that this Court's **per curiam** decision might have been the means of expressing a view that recognizes state law to be something other than what the last reported judicial decision states it to be.

cases the adjudication of which is this Court's chief function.

The specter of a great rush of business to the federal courts in Illinois on account of the decision in this case, raised by petitioner to alarm the Court, will never materialize. The record of decisions below since January 1, 1956, the effective date of present Section 17, is a dismal one from the standpoint of prospective plaintiffs hopeful of success on a judicial jurisdiction issue. The Seventh Circuit's decisions to date stand four against jurisdiction and one in favor of it.[1] The latter is this case.

## CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[1] Cases decided against jurisdiction are **Orton v. Woods Oil & Gas Co.**, 7 Cir., 249 F.2d 198 (1957); **Kaye-Martin v. Brooks**, 7 Cir., 267 F.2d 394 (1959), certiorari denied, 361 U.S. 832; **Trippe Manufacturing Co. v. Spencer Gifts, Inc.**, 7 Cir., 270 F.2d 821 (1959), and **Insull v. New York World-Telegram Corporation**, 7 Cir., No. 12,681 (December 30, 1959). In the **Insull** case, the Court referred to the case at bar as an example of what amounts to "the transaction of any business within this state."

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JAMES R. BROWNING, Clerk

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 523

AB ELECTROLUX,

*Petitioner,*

*vs.*

NATIONAL GAS APPLIANCE CORPORATION,

*Respondent.*

## REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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# SUPREME COURT OF THE UNITED STATES

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Respondent seeks to minimize the lower court's refusal to follow the Illinois Supreme Court's decision in *Grobark v. Addo Machine Co.*, 16 Ill. 2d 426, 158 N. E. 2d 73 (1959), by arguing that jurisdiction over foreign corporations is not an independent question of state law, since the federal constitutional limitations on state jurisdiction and the requirements of Illinois law are said to be identical (Br. 8). Respondent asserts that "the opinion of the Illinois Supreme Court in *Grobark* revolves about the Federal Constitutional problem." *Ibid.* However, the Illinois Court in the *Grobark* opinion, in construing Section 17(1)(a) of the Illinois Civil Practice Act, recognized that the questions of state and federal law are distinct. It stated:

> "While the constitutional question is always present in determining whether a State, consistent with due

process, can enter an *in personam* judgment against a nonresident defendant, nevertheless it is important to avoid placing the cart before the horse. If, for example, there are no minimum contacts with the State in a particular case, it will be unnecessary to decide whether the State, consistent with due process, can assume jurisdiction • • •." 16 Ill. 2d at p. 431.[1]

To the same effect, see *Pulson* v. *American Rolling Mill Co.*, 170 F. 2d 193, 194 (C.A.1, 1948).

Even if the limits on jurisdiction imposed by Illinois law were coextensive with those of the Fourteenth Amendment, the Illinois courts could not and would not have assumed jurisdiction over petitioner in the present case. The power of a state to assume jurisdiction over nonresidents is not unlimited. *Hanson* v. *Denckla*, 357 U. S. 235. The present case does not involve a state's manifest interest in protecting its residents who are injured by a nonresident engaged in activity subject to special regulation, such as insurance. *Idem* at p. 252. Both petitioner and respondent are foreign corporations not licensed to do business in Illinois (R. 50, 59).[2] Petitioner has no office or agent in Illinois. Jurisdiction is asserted on the basis of a single alleged executory contract negotiated in Sweden. Even if a contract had been formed, which petitioner

1. In this connection, it may be noted that the Illinois Legislature enacted a narrower statute than other states (Pet. 6). Under Section 17(1)(a) Illinois "does not reach the limit of its constitutional power • • •." O'Connor and Goff, "Expanded Concepts of State Jurisdiction over Non-Residents," 31 Notre Dame Lawyer, 223, 237 (1956).

2. Respondent's contention that its dealings with petitioner constituted the "transaction of business" in Illinois by petitioner is belied by respondent's failure to obtain the certificate required by any foreign corporation "before it transacts business" in Illinois (R. 59). 1 Ill. Rev. Stat. ch.32, § 157.102 (1959). Since it appears that respondent, purely a paper corporation, transacted no business in Illinois, it could not have been sued there (cf. Br. 17).

denies, it would involve no more than interstate sales by a foreign manufacturer to an independent buyer in the forum. This is not enough to warrant jurisdiction. *Air Devices, Inc.* v. *Titus Mfg. Corp.*, 269 F. 2d 837 (C.A.3, 1959); *Venus Wheat Waters, Inc.* v. *Venus Foods, Inc.*, 174 F. Supp. 633 (D. Mass., 1959; Aldrich J.). To sustain jurisdiction in such a situation "would not only be offensive to the due process clause but it would involve the danger of grave burdens and impediments to interstate commerce." *Erlanger Mills* v. *Cohoc Fibre Mills*, 239 F. 2d 502, 507 (C.A.4, 1956).

These constitutional questions need not be decided in the present case, however, because Illinois law as declared by its highest court does not permit jurisdiction. Regardless of the theory of the *Grobark* opinion, the result there reached will be controlling on Illinois courts and must therefore be followed in diversity cases. *Pulson* v. *American Rolling Mill Co.*, 170 F. 2d 193, 195 (C.A.1, 1948).

Respondent is obviously dissatisfied with the *Grobark* decision and relies on the dissenting opinion in that case (Br. 17), but of course the court below was bound to follow the ruling of the majority. Respondent suggests that the majority opinion "completely emasculated" Section 17 of the Illinois Civil Practice Act and thus "no court could be criticized for failure to follow *Grobark*" (Br. 21). However, federal courts in diversity cases are bound by state court decisions even if they believe them to be erroneous interpretations of a state statute. *Fidelity Trust Co.* v. *Field*, 311 U. S. 169.

Respondent implies that the *Grobark* decision should be ignored because each case "turns on its own facts" and must be decided "on an *ad hoc* basis" (Br. 9). But courts in other circuits have recognized that a leading state court

opinion "not only lays the law down for its precise facts but clearly set[s] down the principles which are to guide in future decisions * * *." *Mississippi Wood Preserving Co.* v. *Rothschild*, 201 F. 2d 233, 235 (C.A.5, 1953). As explained in the petition for certiorari, the principles laid down in the *Grobark* case preclude the assertion of jurisdiction here. (Pet. 10). To ignore these principles because of insignificant factual distinctions would result in eliminating all basis for predictability and consistency in the law. Furthermore, any distinctions between the present case and *Grobark* make it obvious that the court which decided *Grobark* would *a fortiori* deny jurisdiction here (Pet. 10-11).

Respondent attempts to distinguish the facts of the *Grobark* case although none of these supposed distinctions was considered even worthy of mention by the court below, which failed to discuss the *Grobark* case. Many of these irrelevant "distinctions" did not even occur to respondent until the brief in opposition to certiorari was filed. Before the district court respondent did not attempt such distinctions but instead shortsightedly referred to the opinion of the Appellate Court of Illinois in the *Grobark* case (18 Ill. App. 2d 10), before it was affirmed, as follows:

> "This case is not the law of Illinois for the Supreme Court granted leave to appeal on September 16, 1958, 19 Ill. App. 2d ii. Until the case is finally decided the Appellate Court decision is not binding. We believe the case will have a 'brief career'." (District Court Br. 19-20.)

Several misstatements appear in respondent's comparison of the two cases. Whereas it was undisputed that the defendant's president in *Grobark* carried on the contract negotiations with plaintiff in Illinois (16 Ill. 2d at pp. 427-428), respondent baldly states that this fact was merely plaintiff's allegation and that the Supreme Court found

otherwise (Br. 19)! Respondent asserts that "solicitation was absent in the *Grobark* case" (Br. 19), but as the opinion there states, the defendant "made various efforts to obtain the names of plaintiff's customers and dealers" and "and after considerable importuning" plaintiff agreed. 16 Ill. 2d at pp. 427-428. Respondent also makes the astounding statement that in the present case, unlike *Grobark*, petitioner's negotiations with respondent made them "virtually a partnership" (Br. 20). Nothing in the record even remotely supports this assertion which is made for the first time in respondent's brief in opposition. The negotiations between petitioner and respondent were at arm's length between separate, independent concerns, one of which was a prospective seller and the other a prospective buyer. Under the proposed contract petitioner would have had no interest in respondent's profits or voice in its operations and respondent was not even to use petitioner's name on its products (R. 9-10). Respondent also asserts that in the present case there was a contract whereas there was none in *Grobark* (Br. 20). In fact, there was unquestionably a contract in the *Grobark* case which had been in effect for two years. Although the defendant claimed the agreement was unenforceable for lack of mutuality, the Illinois Supreme Court assumed its validity and therefore never reached this question. (16 Ill. 2d at pp. 428, 437, 438.) In the present case petitioner has consistently denied that its negotiations with respondent ever culminated in an agreement.[3] Petitioner contends that even

3. As petitioner told the court below, its letter of January 21 refers to a final agreement which was never drafted or signed (R. 11). Such references to a formal contract in negotiations by correspondence indicate that the parties do not intend the contract to be binding until the formal agreement is signed. *E.g., El Reno Wholesale Grocery Co.* v. *Stocking*, 293 Ill. 494, 500-501, 127 N. E. 642 (1920); *Hausman Steel Co.* v. *N. P. Severin Co.*, 316 Ill. App. 585, 45 N. E. 2d 552 (1942). Respondent knew there was no contract, for it requested petitioner to "draw agreement" in its purported "acceptance" cable of January 28 (R. 12).

if there was a contract, under *Grobark* the Illinois courts would not take jurisdiction. The opinion below misinterpreted petitioner's statement to be a concession that there was a contract. But in the present case the very existence of an enforceable contract is questionable, and this alleged executory contract is the sole basis for asserting jurisdiction over the defendant.

Respondent's assertion that a denial of jurisdiction would "give petitioner relative immunity from legal responsibility" (Br. 17) is groundless. If respondent's claim for $1,000,000 damages (R. 5) is not frivolous it should adequately cover the expenses of a suit in Sweden. Respondent's agents have not found the expense of a trip to Sweden "prohibitive" in the past (R. 25-26, 31-32, 38). Sweden is a more appropriate forum for the suit because many of the witnesses reside there, the alleged contract was negotiated there,[4] and performance was also to take place abroad (R. 10). Moreover, Swedish law would govern the construction of the alleged contract and indeed determine whether there was a contract. See Lynn, "Groundwork for the Lawsuit," 1954 Ill. Law Forum 536-540; Bernhard, "A Rationalization of the Illinois Conflict of Laws Rules Applicable to Contracts," 40 Illinois Law Review 165, 184 (1945). Since conspiracy Count III has been eliminated (Pet. 20-21), it is immaterial that Manitowoc could not be joined in a Swedish action. Nor could petitioner have sued respondent in Illinois, as respondent claims (see Note 2, *supra*).

Respondent alludes to "petitioner's constant references to the requirement in the forum of a 'registered agent' to sustain jurisdiction over a foreign corporation" (Br. 18). There is not a single such reference in the petition. Peti-

4. The purported contract was negotiated solely in Stockholm (R. 9, 25-26, 31-32). Therefore the complaint does not allege any contract negotiations in Illinois (R. 2-4, 24-28).

tioner does not and has never argued that a foreign corporation can be sued in a state only if it qualifies to do business there by naming a registered agent. Nor does petitioner deny that "regular, continuous and sustained" solicitation of business within a state by a resident agent, as in the *Frene* case cited by respondent (Br. 17), is enough to sustain jurisdiction.

Petitioner does contend, however, that it cannot be sued in Illinois on the basis of a single alleged executory contract, mailed from Sweden and covering the sale of goods to be delivered abroad, when petitioner has no office or agent of any kind residing in the state. This view was adopted by the *Grobark* decision, which is controlling in the present case, and has also been adopted in circuits other than the Seventh. See Pet. 11. The failure of the court below to adhere to this principle raises important questions for certiorari, not only because it presents serious constitutional questions as to the power of the respective States over foreign corporations, *Hanson* v. *Denckla*, 357 U. S. 235, but also because it disregards controlling state law. *Riverbank Laboratories* v. *Hardwood Products Corp.*, 350 U. S. 1003. The "box-score" of Seventh Circuit decisions compiled by respondent (Br. 23, note 7) does not indicate that that court has retracted its decision in the instant case to open federal courts to suits on contracts against foreign corporations whose contacts with Illinois are insufficient to warrant jurisdiction under state law. Reversal of the decision below is required in order that the principle may be firmly established that state court decisions regarding jurisdiction over foreign corporations must be followed by federal courts of appeal in diversity cases. If this case had remained in the state court (Pet. 2, note 2), there is no doubt that it would have been dismissed under the *Grobark* decision. Being a diversity case, the result should be the same in the federal court.

## CONCLUSION

For the reasons expressed herein and in the petition, a writ of certiorari should issue. Because the refusal of the court of appeals to follow the Illinois Supreme Court's most recent construction of the state jurisdictional statute was so egregious, petitioner suggests that the judgment below should be summarily reversed at the same time.

Respectfully submitted,

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January 1960.